



**STATE OF WISCONSIN**  
**Division of Hearings and Appeals**

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In the Matter of

Milwaukee County Department of Human Services, Petitioner

vs.

DECISION

██████████, Respondent

Case #: FOF - 174096

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On May 5, 2016, Milwaukee Enrollment Services filed a petition under Wis. Admin. Code §HA 3.03 and 7 C.F.R. § 273.16 to disqualify ██████████ from receiving FoodShare benefits for a period of one year.

This hearing was originally scheduled for June 17, 2016. A hearing did take place on that date with ALJ Nancy Gagnon, but shortly after the hearing took place, the Respondent contacted the Division of Hearings and Appeals and indicated that he was unable to be at the hearing due to health concerns. Good cause was found for his non-appearance and another hearing date was scheduled for July 7, 2016.

On July 7, 2016, the Respondent contacted the Division of Hearings and Appeals and indicated the he was quadriplegic, that he was having further medical issues, and that he was having difficulty getting to the hearing location. The hearing was then rescheduled to August 2, 2016.

It was suggested that the Respondent appear by phone, since it is difficult for him to get around, but the Respondent stated that he would prefer to appear at the hearing location.

This appeal was then reassigned to ALJ Ishii.

The hearing took place as scheduled on August 2, 2016, in Milwaukee, Wisconsin. The Respondent appeared at the hearing location and the ALJ appeared by phone.

The issue for determination is whether the Respondent committed an Intentional Program Violation (IPV).

NOTE: Judicial notice is being taken of the plea agreement and conviction in case ██████████ ██████████, from the Federal District Court.

There appeared at that time the following persons:

**PARTIES IN INTEREST:**

Petitioner:

Department of Health Services  
1 West Wilson Street, Room 651  
Madison, WI 53703

By: ██████████ HSPC, Sr.

Milwaukee Enrollment Services  
1220 W. Vliet St., Room 106  
Milwaukee, Wisconsin 53205

Respondent:

[REDACTED]  
[REDACTED]  
[REDACTED]

I

ADMINISTRATIVE LAW JUDGE:  
Mayumi M. Ishii  
Division of Hearings and Appeals

### **FINDINGS OF FACT**

1. The Respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare benefits between July 2011 and June 2012. The Respondent typically received \$200 per month, on the 14<sup>th</sup> of the month. (Exhibit 6)
2. On June 1, 2011, the Respondent completed and electronically signed an ACCESS renewal, indicating "I understand the penalties for giving false information or breaking the rules." This application contained a penalty warning that advised the Petitioner that he could be disqualified from the FoodShare program if he traded or sold his benefits. (Exhibit 9)
3. On December 21, 2011 the Respondent completed and electronically signed an ACCESS renewal, indicating "I understand the penalties for giving false information or breaking the rules." This application contained a penalty warning that advised the Petitioner that he could be disqualified from the FoodShare program if he traded or sold his benefits. (Exhibit 10)
4. On July 26, 2010, December 10, 2010 and on June 8, 2011, the agency sent the Respondent an Eligibility and Benefits booklet that warned him that he could be disqualified from the FoodShare program, if he committed an intentional program violation. (Exhibits 11 and 12)
5. In August 2010, the owner of [REDACTED] became an authorized SNAP vendor, but he was no longer a subcontractor distributing seafood and meat. Instead, he was purchasing FoodShare benefits for cash, paying the benefit recipients only a percentage of the face value of the card. The recipients did not receive any food products. This operation continued until January 2013. (Exhibit 13)
6. On April 14, 2012, an EBT card ending in [REDACTED] was used to make a \$200 "purchase" from [REDACTED] [REDACTED]. (Exhibit 14)
7. The card ending in [REDACTED] was issued to the Respondent on December 16, 2011 and was not replaced until November 9, 2012. (Exhibit 15)
8. On May 16, 2016, Milwaukee Enrollment Services, prepared an Administrative Disqualification Hearing notice, indicating that it believed the Respondent trafficked \$200.00 in benefits on April 12, 2012. (Exhibit 3)

### **DISCUSSION**

*What is an IPV?*

An IPV is defined at 7 C.F.R. §273.16(c) as intentionally: making a false or misleading statement or misrepresenting; concealing or withholding facts; or committing any act that constitutes a violation of the Food

Stamp Act, federal regulations or any Wisconsin statute relating to the use, presentation, transfer, acquisition, receipt or possession of food stamp coupons or an authorization to participate (ATP) card.

The Department's written policy restates federal law, below:

### **3.14.1 IPV Disqualification**

7 CFR 273.16

A person commits an Intentional Program Violation (IPV) when s/he intentionally:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts; or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

An IPV may be determined by the following means:

1. Federal, state, or local court order,
2. Administrative Disqualification Hearing (ADH) decision,
3. Pre-charge or pretrial diversion agreement initiated by a local district attorney and signed by the FoodShare recipient in accordance with federal requirements, or
4. Waiver of the right to an ADH signed by the FoodShare recipient in accordance with federal requirements.

*FoodShare Wisconsin Handbook, §3.14.1.*

The agency may disqualify only the individual who either has been found to have committed the IPV or has signed a waiver or consent agreement, and not the entire household. If disqualified, an individual will be ineligible to participate in the FS program for one year for the first violation, two years for the second violation, and permanently for the third violation. However, any remaining household members must agree to make restitution within 30 days of the date of mailing a written demand letter, or their monthly allotment will be reduced. 7 C.F.R. §273.16(b).

### *What is the Agency's Burden of Proof?*

In order for the agency to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit an intentional program violation per 7 C.F.R. §273.16(e)(6).

"Clear and convincing evidence" is an intermediate standard of proof which is more than the "preponderance of the evidence" used in most civil cases and less than the "beyond a reasonable doubt" standard used in criminal cases.

In Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. In criminal cases, while not normally stated in terms of preponderance, the necessary certitude is universally stated as being beyond a reasonable doubt.

*Wisconsin Jury Instruction – Civil 205* is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4<sup>th</sup> ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence, a firm conviction as to the existence of each of the two elements even though there may exist a reasonable doubt that the Respondent trafficked his benefits.

#### *The Merits of the Agency’s Case*

In the case at hand, Milwaukee Enrollment Services has established, by clear and convincing evidence, that the Respondent sold his FoodShare benefits on April 14, 2012. First, the transaction was for a whole dollar amount, which makes it more likely, the benefits were sold, instead of used to purchase food. Second, the transaction took place on the 14<sup>th</sup> of the month, the day the Respondent received his benefits. No one should have had that information, except the Respondent. Third, the EBT card that was used, was not replaced until November 2012, seven months after the suspect transaction took place, making it less likely someone else misused the benefits. Fourth, at the time of the transaction, [REDACTED] was no longer a subcontractor distributing meat and seafood; but was instead purchasing EBT benefits for a fraction of face value. As such, the Respondent had to have been selling his benefits.

The Respondent asserts that at the time in question he had a friend, who was his caregiver. The Respondent asserts that this caregiver would go shopping with him. The Respondent asserts that his caregiver is the one who trafficked the benefits. The Respondent’s claim is not credible.

Given that his entire month’s FoodShare allotment was sold on the day he received his allotment, one has to wonder how the Respondent would not have noticed his inability to pay for food that month, or the absence of food in his home. Indeed, while the Respondent suffers from a degenerative disease that affects his physical condition, there is no indication that it affects his cognitive abilities. Further, the Respondent indicated that his condition did not deteriorate to the point of needing a wheelchair until 2014.

The Respondent asserted that he had to replace his EBT card because his caregiver had misused his benefits. However, he did not replace the card in question until seven months after the transaction with John Henry took place. Had his caregiver been misusing the benefits, one would think the Respondent would have acted sooner. Further, looking at the case comments, there is no indication that the Respondent contacted the agency and reported the alleged misuse by his caregiver. (See Exhibit 7)

Based upon the totality of the evidence, it is found that the agency has met its burden to prove, by clear and convincing evidence, that the Respondent was trafficking (selling) his FoodShare benefits on April 14, 2012.

There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See John F. Jelke Co. v. Beck, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. Lecus v. American Mut. Ins. Co. of Boston, 81 Wis.2d 183 (1977). There is nothing in the record to rebut the presumption that the Respondent intentionally sold his benefits to [REDACTED]. On the contrary, the Respondent was warned in his June 2011 and December 2011 renewals about the consequences of selling or trading his benefits, and he was also warned in the Eligibility Benefits Booklets sent to him in July 2010, December 2010 and June 2011, but he sold his benefits anyway.

### **CONCLUSIONS OF LAW**

1. The Respondent committed an intentional program violation by selling his benefits on April 14, 2012.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the Respondent.

**NOW, THEREFORE**, it is

### **ORDERED**

That the IPV for claim number [REDACTED] is sustained and that the Respondent is hereby ineligible to participate in the FoodShare program for a period of one year, effective the first month following the date of receipt of this decision.

### **REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR**

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

### **APPEAL TO COURT**

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

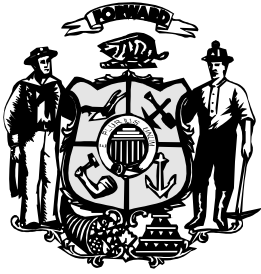
Given under my hand at the City of Milwaukee,  
Wisconsin, this 3rd day of August, 2016

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\sMayumi M. Ishii  
Administrative Law Judge  
Division of Hearings and Appeals

c: Miles - email  
Public Assistance Collection Unit - email  
Division of Health Care Access and Accountability - email  
[REDACTED] - email





## **State of Wisconsin\DIVISION OF HEARINGS AND APPEALS**

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The preceding decision was sent to the following parties on August 3, 2016.

Milwaukee Enrollment Services  
Public Assistance Collection Unit  
Division of Health Care Access and Accountability  
[REDACTED]@dhs.wisconsin.gov